

REMARKS

This responds to the Office Action mailed on February 21, 2008.

Claim 41 has been amended. No claims have been canceled or added. Thus, claims 34-36, 41, and 45-48 are now pending.

For the convenience of the Examiner, Applicant's remarks concerning the claims will be presented in the same order in which the Examiner presented them in the Office Action.

Amendments to Claim 41

Claim 41 has been amended. No new matter has been introduced.

Independent claim 41 has been amended by adding the phrase "an out-of-band transmitter to transmit a channel selection signal comprising the selected non-interfering carrier frequency".

Support for this language may be found, for example, in the original disclosure at page 7, lines 18-27.

Rejection of Claims 34-36, 47, and 48 under 35 U.S.C. §102(e) As Anticipated by Patsiokas

Claims 34-36, 47, and 48 were rejected under 35 U.S.C. §102(e) as being anticipated by Patsiokas (U.S. 6,757,913). Applicant does not admit that Patsiokas is prior art and reserves the right to swear behind Patsiokas as provided for under 37 C.F.R. §1.131.

The rule under 35 U.S.C. §102 is well settled that "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2D 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). MPEP §2131.

Patsiokas fails to disclose all of the structural elements recited in independent claim 34.

Patsiokas fails to disclose, for example:

an out-of-band transmitter to transmit a channel selection signal comprising the available non-interfering carrier frequency.

The same Examiner who drafted the current Office Action previously conceded in her March 31, 2006 Office Action that Patsiokas fails to disclose an out-of-band transmitter, because she stated therein that “Patsiokas does not disclose an out-of-band transmitter”.¹ Applicant fully agrees.

Further, the same Examiner previously stated in her August 3, 2006 Office Action that Applicant’s arguments with respect to the rejection of independent claim 34 under 35 U.S.C. §103(a) as unpatentable over Patsiokas in view of Lehtonen were fully considered and were persuasive, so the Examiner withdrew that rejection. If the Examiner found Applicant’s arguments against the Examiner’s prior 35 U.S.C. 103(a) rejection persuasive, it stands to reason that the Examiner’s current 35 U.S.C. 102(e) rejection is even less tenable and should be withdrawn.

For the above reasons, independent claim 34 should be found to be allowable over Patsiokas, and Applicant respectfully requests that the rejection of claim 34 under 35 U.S.C. §102(e) as anticipated by Patsiokas be withdrawn.

Claims 35-36 and 47-48, which depend from claim 34 and incorporate all of the limitations therein, are also asserted to be allowable for the reasons presented above.

**Rejection of Claims 41, 45, and 46 under 35 U.S.C. §103(a)
as Unpatentable over Patsiokas in view of Konisi**

Claims 41, 45, and 46 were rejected under 35 U.S.C. §103(a) as being unpatentable over Patsiokas in view of Konisi et al. (U.S. 6,181,921).

To establish a *prima facie* case of obviousness under 35 U.S.C. §103, the prior art reference (or references when combined) must teach or suggest every limitation of the claim. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA, 1974). MPEP §2143.

Neither Patsiokas nor Konisi disclose all of the limitations recited in independent claim 41. For example, neither Patsiokas nor Konisi disclose:

an out-of-band transmitter to transmit a channel selection signal comprising the selected non-interfering carrier frequency.

¹ Office Action dated March 31, 2006, page 7.

Patsiokas was discussed above. As previously mentioned, the Examiner conceded that Patsiokas fails to disclose an out-of-band transmitter.

Moreover, Konisi fails to disclose any out-of-band transmitter.

For the above reasons, independent claim 41 should be found to be allowable over any combination of Patsiokas and Konisi, and Applicant respectfully requests that the rejection of claim 41 under 35 U.S.C. §103(a) as unpatentable over Patsiokas in view of Konisi be withdrawn.

If an independent claim is nonobvious under 35 U.S.C. §103, then any claim depending therefrom is nonobvious. MPEP §2143.03.

Claims 45 and 46, which depend from independent claim 41, and incorporate all of the limitations therein, are also asserted to be allowable for the reasons presented above.

Additional Elements and Limitations

Applicant considers additional elements and limitations of the claims to further distinguish over the cited references, and Applicant reserves the right to present arguments to this effect at a later date.

Documents Cited But Not Relied Upon For This Office Action

Applicant need not respond to the assertion of pertinence stated for the references cited but not relied upon by the Office Action, because these references are not made part of the rejections in this Office Action. Applicant is expressly not admitting to this assertion and reserves the right to address the assertion should it form part of future rejections.

Conclusion

Applicant respectfully submits that claims 34-36, 41, and 45-48 are in condition for allowance, and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney, Ann M. McCrackin (located in Minneapolis, Minnesota) at (612) 349-9592 or Applicant's below-signed attorney (located in Phoenix, Arizona) to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,

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